SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

Louise Chase, by Jesse Blythe, Prochein Ami, and Louise Chase, in Her Own Right, Plaintiff-Appellant,

vs.

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased, Defendants-Appellees

Relevant Docket Entries

Apr.	12, 1927.	Præcipe to issue Summons filed.
"	12, "	Summons exit returnable 1st Mon. in May 1927.
"	12, "	Statement of Claim filed.
May	2, "	Appearance of Robert T. McCracken for defendants filed.
"	7, "	Summons Returned on April 25th, served as to each defendant and filed.
"	10, "	Affidavit of defense filed.
Oct.	23, 1928.	Præcipe to place case on Trial list filed.
June	10, 1931.	Stipulation of Counsel as to Argument of questions of law filed.
Sept.	9, 1931.	Argued sur preliminary question of law.
"	24, "	Opinion Dickinson J deciding question of law in favor of defendant filed.
Sept.	28, 1931.	Appearance of C. Brewster Rhoads for defendant filed.
Jan.	8, 1932.	Jury sworn.
"	8, "	In open Court, Judgment of non suit.
"	8, "	Motion to strike off Compulsory non suit. In open court motion denied.
Jan.	8, 1932.	Order of Court denying motion to strike off Compulsory non suit, exceptions thereto
[fol. 2]		and order of Court sealing Bill filed.
Jan.	13, "	Præcipe to enter final judgment of non suit filed. Judgment accordingly.
Feb.	20, "	Exceptions and Order of Court allowing exceptions filed.

Feb. 20, 1932. Assignments of error filed.
" 20, " Petition for appeal filed.
" 20, " Order of Court allowing petition for appeal filed.
Feb. 20, 1932. Bond for costs sur appeal with surety in $200 and decree approving bond filed.
" 20, " Praecipe for transcript of record sur appeal filed.
" 23, " Citation allowed and issued.
" 23, " Copy of notice of appeal filed.
" 27, " Citation returned, service accepted and filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

STATEMENT OF CLAIM

Louise Chase, by Jesse Blythe, Prochein ami, and Louise Chase in her own behalf, plaintiff herein, claim of the estate of Frank G. Ormsby, Deceased, defendant, the sum of Fifty Thousand ($50,000.00) Dollars upon a cause of action whereof the following is a statement:

1. Louise Chase is a minor and a resident of the city of St. Louis, Missouri.

2. The late Frank B. Ormsby was a resident of the city of Easton, county of Northampton and state of Pennsylvania, having died in Easton, Pa. on June 14, 1926. Letters testamentary have been issued in the Orphan's Court of Northampton County to Laura G. Ormsby and B. Rush Field as Executors.

3. During the life time of Frank G. Ormsby, he was the owner of a certain six story and basement apartment house or dwelling place situated at 529 West 111th St., New York City, wherein he leased rooms and apartments for profit.

4. The plaintiff was on or about October 17, 1925, together with her mother, Florence Chase, a tenant in the apartment house situated at 529 W. 111th St., New York City, owned, operated and maintained by the said Frank G. Ormsby.

[fol. 4] 5. The said Frank G. Ormsby maintained in the said apartment house as a part of its equipment, a certain elevator for the use of, and which was actually used by his patrons, tenants, servants, agents and employees in carrying persons from floor to floor.

6. The plaintiff, to wit: on or about October 17, 1925, was lawfully in and about the premises owned by the said Frank G. Ormsby, and together with her mother, Florence Chase, she entered the aforementioned elevator at the fifth floor.

7. Suddenly and without warning, with great force and violence, the said elevator being then and there in the control of Albert McCoy, agent and employee of the said Frank G. Ormsby, fell from the fifth floor to the basement.

8. The plaintiff avers that she and her mother, the said Florence Chase, were lawfully in and upon the said elevator, and that the sudden descent of the elevator was wholly without negligence on her part, but on the contrary was directly caused by the negligent maintenance, control and operation on the part of the said Frank G. Ormsby, in that.

(a) The said Frank G. Ormsby failed to employ a competent person to operate said elevator.

[fol. 5] (b) The said Frank G. Ormsby, his agents and employees failed to maintain proper control of the operation of said elevator so as to prevent its sudden, sharp and violent descent.

(c) The said Frank G. Ormsby failed to maintain said elevator in proper mechanical condition.

(d) The said Frank G. Ormsby failed to maintain an adequate safety device on said elevator.

(e) The said Frank G. Ormsby failed to maintain a proper counterweight which would operate as a safety check in the event of the failure in any of the mechanical features in said elevator.

(f) The said accident was due to the careless operation and maintainence of the elevator by the said Frank G. Ormsby, his agents and employees.

(g) Plaintiff avers that the defendant knew, or should have known, of the improper, dangerous and unsafe condition of the said elevator.

9. The said Florence Chase sustained injuries as a result of the fall of said elevator from which she died, and the said Louise Chase sustained serious bodily injuries as follows: to-wit, The right leg of the said Louise Chase was broken in such a manner that it became necessary to amputate it below the knee; the left leg was so badly broken that it is permanently crippled; her spine was severely injured and her whole body was badly bruised and her sys-
[fol. 6] tem sustained a severe nervous shock.

10. By reason of said injuries the plaintiff was obliged to lay out and expend money for medicine and medical attention and the employment of persons to attend her, that she suffered and continues to suffer great pain and distress, both mental and physical, all of which is due to the defendant's negligence as aforesaid.

Wherefore the plaintiff claims of the defendant the sum of $50,000.00 as compensation for the injuries thus sustained.

Jesse W. Blythe, Guardian for Louise Chase. Louise Chase. (Signed) E. J. and J. W. Fox, Attorneys for the Plaintiff.

Duly sworn to by Louise Chase. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

B. Rush Field being duly sworn according to law, deposes and says that he is one of the above named defendants and one of the executors of the Estate of Frank G. Ormsby, Deceased, that said defendants have a just, true and legal defense to the whole of the plaintiff's claim and make answer to the Statement of Claim as follows:

1. Deponent has no knowledge or means of knowledge for ascertaining the truth of the averments of paragraph 1 of the Statement of Claim and if material to this cause demands proof thereof.

2. Admitted.

3. Admitted.

4. Deponent avers upon information and belief that the apartment at 529 West 111th Street, New York City, referred to in paragraph 4 of the Statement of Claim, was leased to Florence Chase, the mother of the plaintiff and that said Florence Chase was therefore the tenant of the said apartment.

[fol. 8] 5. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 5 of the Statement of Claim.

6. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 6 of the Statement of Claim.

7. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 7 of the Statement of Claim.

8. Deponent admits that at the time referred to in the Statement of Claim plaintiff and her mother, the said Florence Chase, were in and upon the said elevator. Deponent denies however that the accident referred to in the Statemnt of Claim was caused by or was the result in any particular of negligence of any nature whatsoever in maintenance, control or operation of said elevator on the part of said Frank G. Ormsby, his servants, agents, or employees and particularly denies that said Frank G. Ormsby can be charged with any of the acts of commission or omission refered to in paragraph 8 (a) to 8 (g) inc. of the Statement of Claim respectively.

[fol. 9] 9. Deponent avers that the manner and cause of the death of the said Florence Chase has no relation to the cause of action upon which the Statement of Claim is based

and deponent is therefore advised by counsel, believes and therefore avers that it is unnecessary to answer or deny the allegation of the Statement of Claim concerning the same. Deponent is further advised by counsel, believes and therefor avers that it is unnecessary for him either to answer or deny the remaining allegations of paragraph 9 of the Statement of Claim.

10. Deponent denies that plaintiff has suffered any injuries or has been obliged to expend any moneys on account of any negligence of any nature upon the part of the defendant. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him to either answer or deny the remaining averments of paragraph 10 of the Statement of Claim.

11. Deponent is further advised by counsel, believes and therefore avers that under the law of the State of New York a right of action against an alleged tortfeasor abates with the death of the allegd tortfeasor and that inasmuch as the alleged accident out of which this suit arises occurred in the State of New York therefore any right of action [fol. 10] which this plaintiff might have had has abated with the death of the said Frank G. Ormsby as referred to in paragraph 2 of the Statement of Claim.

All of which deponent avers to be true and correct to the best of his knowledge, information and belief and expects to be able to prove the same at the trial of this cause.

(Signed) B. Rush Field.

Sworn to and subscribed before me this 9th day of May A. D. 1927. Commission expires March 2, 1929. Claire G. LaVelli, Notary Public, Easton, Pa. (Seal.)

[fol. 11] IN UNITED STATES DISTRICT COURT

STIPULATION PERMITTING DEFENDANT TO FILE AN AMENDED AFFIDAVIT OF DEFENSE

It is hereby stipulated and agreed by and between E. J. & J. W. Fox, counsel for the above named plaintiff, and Robert T. McCracken, counsel for the above named defend-

ant, that the Affidavit of Defense heretofore filed in the above entitled case may be amended by substituting for Paragraph 11 in the Affidavit of Defense heretofore filed, the following paragraph.

"11. As a further defense to the plaintiff's claim, the defendant is advised, believes and therefore avers that no right of action exists in or may be prosecuted by the plaintiff based upon any tort or negligence of the said Frank G. Ormsby, deceased, or any of his servants, agents or employees against the defendants above named in this Honorable Court or in any other forum, for the following reasons:

"The defendant's decedent, Frank G. Ormsby, departed this life on the 14th day of June 1926 prior to the issuance of the writ in this case. No suit was brought by the plaintiff or by any one on her behalf against the said Frank G. Ormsby during his lifetime. The accident out of which this suit arose took place as averred in the statement of claim at 529 West 111th Street, City of New York, State of New [fol. 12] York. Defendants are advised by counsel and therefore aver that all rights of action for damages caused by said accident are governed by the laws of the State of New York in which State the said accident took place; and that by the laws of said State a right of action against an alleged tort feasor abates with the death of the alleged tort feasor.

"Defendants accordingly aver upon such advice that inasmuch as the alleged accident out of which this suit arises occurred in the State of New York and inasmuch as no right of action was brought against said Frank G. Ormsby, the alleged tort feasor, during his lifetime, that any right of action which existed prior to his death abated with his death and accordingly may not now be prosecuted.

"Deponent respectfully submits said additional defense as a full, complete and separate legal defense to the plaintiff's claim in the above entitled matter and submits that the same may be determined separately and in advance of the trial upon the merits or contemporaneously therewith as to this Honorable Court may seem the more expedient."

It is hereby further stipulated and agreed by and between E. J. & J. W. Fox, counsel for the above named plaintiff, and Robert T. McCracken, counsel for the above named [fol. 13] defendant, that the plaintiff may within fifteen

(15) days after the filing of this stipulation file her reply to the new matter contained in Paragraph 11 of the Affidavit of Defense as hereinbefore amended.

Edward J. Fox, Attorney for Plaintiff. Robert T. McCracken, Attorney for Defendant.

[fol. 14] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CERTAIN FACTS, ETC.

And now, to wit, this 29th day of May, 1931, it is stipulated and agreed by and between Edward J. Fox, Esq., counsel for the plaintiff, and C. Brewster Rhoads, Esq., counsel for the defendants, in the above-captioned case, that the question of law raised in Paragraph 12 of the affidavit of defense filed herein be argued before the Honorable Oliver B. Dickinson, Judge of the United States District Court for the Eastern District of Pennsylvania, prior to trial on the merits of this cause, with the same force and effect as if the case had proceeded to trial before a jury, witnesses for the plaintiff heard, and at the close of the plaintiff's case a motion for compulsory non-suit had been made by counsel for the defendants for the reason that

"Under the law of the State of New York a right of action against an alleged tortfeasor abates with the death of the alleged tortfeasor and, inasmuch as the alleged accident out of which this suit arises occurred in the State of New York, any right of action which this plaintiff might have had has abated with the death of Frank G. Ormsby, the alleged tortfeasor."

It is further stipulated and agreed that, for the purpose of [fol. 15] the argument of the aforesaid question of law, the following additional facts shall be considered as having been affirmatively proved:

First. The accident out of which this cause of action arises, occurred in the City of New York, State of New York, on October 17th, 1925.

Second. Florence Chase, mother of plaintiff, died on December 22nd, 1925.

Third. Frank G. Ormsby died on June 14th, 1926, at Easton, Pennsylvania, his legal domicile and residence for a period of upwards of twenty years.

Fourth. Benjamin T. Chase, father of the plaintiff, died in St. Louis, Missouri, on July 2nd, 1926.

Fifth. Depositions of witnesses called on behalf of plaintiff were taken in St. Louis, Missouri, on April 27th, 1929, were examined by counsel for the plaintiff and cross examined by counsel for the defendants.

Sixth. The statement of claim was filed on March 17th, 1927.

Seventh. The appearance of Robert T. McCracken as attorney for the defendant, was entered on April 27th, 1927. The affidavit of defense was filed on May 9th, 1927, and the Court is to consider the said pleadings as a part of this stipulation. No question of law is raised by statutory demurrer under the provisions of Section 20 of the [fol. 16] Practice Act of 1915, nor did defendants file a petition in pursuance of the terms of the Act of March 5th, 1925, P. L. 23.

It is further stipulated and agreed that, in the event of denial by this Court of defendants' motion for compulsory non-suit, the cause shall thereupon be set down for trial at the next term of Court; that, in the event this Court sustains defendants' motion for compulsory non-suit and denies motion of plaintiff to strike off the non-suit so entered, an appeal may be taken by the plaintiff upon the record as herein constituted, with the same force and legal effect as if a trial had been had upon the merits and defendants' motion for compulsory non-suit had been granted by the Trial Judge at the conclusion of the plaintiff's testimony, and the motion by the plaintiff to take off the compulsory non-suit had been denied by the Court.

Edward J. Fox, Attorney for Plaintiff. G. Brewster Rhoads, Attorney for Defendants.

[fol. 17] In United States District Court

Opinion of the Court

Sur Statutory Demurrer

Dickinson, J.:

This cause must look for its ruling to the misty subject of the Conflict of Laws. The defendants' decedent was the owner and operator of an elevator. The plaintiff was injured by a fall of the elevator due, as is averred, to the negligence of its operator. The injury, however, was sustained in the State of New York. By the laws of that state the common law maxim is followed that the right of recovery for personal torts dies with the person of the tortfeasor unless an action was begun in his lifetime. The action is brought in Pennsylvania, in which state by statute a different rule prevails, but the action was not brought until after the death of Grimsby who had he not died would have been the defendant. A preliminary question of law is raised, which we discuss as if raised in the method prescribed by the Practice Act of 1915, to the effect that the cause of action died with the tortfeasor, notwithstanding the other fact that the cause of action is personal and transitory. Under the laws of New York the plaintiff would have neither a cause nor a right of action, assuming these two things not to be the same. Under the laws of Pennsylvania [fol. 18] the right to seek a recovery, had the injury been herein sustained, is not denied. The question thus becomes, as we view it, by the laws of which state is the case to be determined?

We have sub-captioned the case and treated it as if a statutory demurrer had been interposed to the plaintiff's action. In fact, the required affidavit raising this as a question at law has not been filed. Counsel have attempted to raise the question by a stipulation. We are unable to see that this can be made effective. It would, however, be a great hardship upon the plaintiff to require her to attend the trial with her witnesses and go through the form of introducing evidence in support of her entire case and then have it thrown out of Court, not on its merits as a case arising under the law of Pennsylvania, but upon the proposition that her case arose, if at all, under the laws of New

York, and judged by that law she had no case. If the question now raised is decided in her favor she would suffer no hardship, but if it is decided against her, an appellate review must take up the whole case, thus subjecting her to the double hardship of the expense of proving her whole case and again to the review of it.

The purpose of the stipulation we think can be reached by determining the suggested question now. If found for her, she may then go on with her entire case, the same ruling now made being made at the trial. The defendants may protect themselves by an exception to the ruling, and the [fol. 19] rights of both parties are thus preserved. If the question is decided against her, then the facts upon which it depends may be stipulated as they have been, and the ruling made repented as a trial ruling, coupled, if need be, with an offer to prove negligence, and the evidence rejected because negligence would then be wholly immaterial. The plaintiff could protect herself by exception, and then have a very short record to have reviewed. This is within the spirit of the stipulation, and we assume the agreement of counsel to it and will pass upon the question raised. The real question we think to be that stated.

The discussion to which we have been treated is most interesting and helpful. The question, as most questions, really turns for its answer upon the approach to it. The plea by which it is raised the plaintiff treats as a plea in abatement; the defendants discuss it as a plea in bar. The plaintiff looks upon the case as one of a right of action which is averred by the defendants to have abated by the death of the tortfeasor; the defendants contend that the plaintiff has no cause of action, the one she once had having been ended by her failure to enforce it by suit when it existed. This is nearly, if not quite, the difference between a question of procedural and one of substantive law. If it is a question of procedure the law of the form controls; if it is a question of substantive law, thence the lex loci is our guide.

The basic principle which underlies the doctrine known as the Conflict of Laws is that of judicial duty or obligation. [fol. 20] If we reverse in part the fact situation the application of this principle will be made clear. If, under the laws of New York, for illustration, the plaintiff had a cause of action and a right of action but the defendant was in

Pennsylvania, suit must here be brought. Assuming the plaintiff under the laws of Pennsylvania to have no cause of action it would, nevertheless, be the duty of the Pennsylvania Court to try the cause as a cause arising under the laws of New York, and to treat the law of that state as the applicable law. Numberless precedents for this could be cited. In many instances there is a like statutory cause of action given by each of the two states but the right of action is different persons. In one case, as in Pennsylvania, it may be given to a surviving spouse or children or parents, and by the laws of the other state to the legal representative of the decedent, or, as in New Jersey, to a special representative as administrator ad prosequendum. The party plaintiff is dictated by the lex loci because the right of action is in the person to whom the cause of action is given, and the legal merits are adjudged in accordance with the same law, but the procedure followed is that of the forum. This is a well settled doctrine.

The question before us is whether the same doctrine applies when the fact situation is reversed in that there is no cause of action under the lex loci, but the law of the forum would give it. If the lex loci controls when a right of action [fol. 21] is given it is difficult to understand why it does not likewise control when one is not given. Viewed from another angle the right given by the laws of Pennsylvania is a statutory right. How can a Pennsylvania statute have an extraterritorial operation? The answer is that it does not have. It may be said with equal truth that the lex loci is likewise without extraterritorial force. Why then should the Courts of the forum give it effect? The answer is to be found in the duty imposed upon the Courts of other states and the obligation which rests upon the tortfeasor. The Courts of the state which gives the right of action would vindicate it if they had jurisdiction of the defendant. Not having such jurisdiction, they cannot try the cause. A Court of another state, which has such jurisdiction, will by analogy to the doctrine of comity do when the Courts of the first state cannot do but will apply the same law which the Courts of the first state would apply. This is, we think, the true doctrine, and judged by it as the Courts of New York would find, that the plaintiff had no case, we must hold likewise, however, much we may prefer the law of

Pennsylvania to that of New York on this particular subject as more consonant with the dictates of natural justice.

There are other phases of the question which might with profit be discussed but we see no need to go into them further than the comment that the conclusion reached is in [fol. 22] accord with the run of the adjudged cases which have been cited to us, among which are:

Davis vs. Mills, 94 U. S. 451;
Spokane vs. Whitley, 237 U. S. 487;
Usher vs. H. R., 126 Pa. 206;
Warren vs. Furstenheim, 35 Fed. Rep. 601;
Martin vs. Wabash, 142 Fed. Rep. 650;
Whitton vs. Bennett, 77 Fed. Rep. 272;
B. & O. vs. Joy, 173 U. S. 226;
Martin vs. B. & O., 151 U. S. 673;
Dimmick vs. H. R., 103 U. S. 2.

We say this notwithstanding the truth that the cases are not uniform in the mode in which the doctrine is expressed. Many of the cases can be reconciled by the distinction before noted between procedural and substantive law. When the plaintiff in a pending suit dies, as in B. & O. vs. Joy, the question of the survival of the action is determined by the lex fori because this is a *procedural* question, but that of whether a right of action in the sense of a cause of action exists when suit is brought is a question of substantive law to be determined by the lex loci.

It must be admitted that the case of Whitton vs. Bennett cannot be so distinguished upon its facts, although the ruling would seem to be so based. As the ruling *made* is phrased, it is that the lex fori "determines the nature and extent of the remedy." This is in entire accord with the doctrine as we have formulated it. The disturbing thought [fol. 23] is that the case arose in a state which gave a right of action but was tried in a state which did not, and the law of the latter was held to prevail. The appellate experience of this case may throw some light upon the quoted ruling. The Appellate Court took occasion to say that it was unnecessary to discuss it.

The question raised is determined in favor of the defendant. If the suggestion we have made is accepted by counsel, a jury may be empanelled at any time.

[fol. 24] IN UNITED STATES DISTRICT COURT

Philadelphia, Pa.,
Friday, January 8, 1932 10:00 a. m.

Before Hon. Oliver B. Dickinson, Jr., and a Jury

Present:

E. J. Fox, Jr., Esq., for plaintiff.
Laurence H. Eldredge, Esq., for defendant.

PLAINTIFF'S OFFER OF PROOF

Mr. Fox: I will make the following offer of proof:

Plaintiff proposes to prove that on the 17th day of October, 1925, Frank G. Ormsby was the owner of a certain apartment house situated in the City of New York at No. 529 West 111th Street. That as the owner of the apartment house he leased rooms and apartments for profit. That among the tenants was Mrs. Florence Chase, the mother of Louise Chase, the plaintiff, who had been occupying an apartment on the fifth floor of said building for a short time prior to said October 17th, 1925. That the said apartment house had a passenger elevator which [fol. 25] was installed for the use of the tenants of said building and was in use on said date and was constantly used by his tenants, servants, and agents for carrying persons from floor to floor. That on the afternoon of October 17th, 1925, the plaintiff with her mother entered said passenger elevator at the fifth floor for the purpose of descending to the first floor, when the elevator suddenly, without warning, with great force and violence fell from the said fifth floor to the basement of the building and as the result of said fall, Florence Chase, the mother, was killed and the plaintiff was seriously and grievously injured. That the character of the injuries which the plaintiff received were such that she has been permanently maimed; that she was taken immediately after the accident to a hospital and it became necessary to amputate her right leg. That the left leg was so badly broken that it is permanently crippled, that her spine was severely injured and her whole body was badly bruised and her system sustained a severe nervous shock. That the said plaintiff by reason of the

injuries received was obliged to remain continuously in a hospital, first in New York and then in St. Louis until September, 1926, where she received constant medical care and attendance of both physicians and surgeons and was unable in consequence of the injuries thus received to give any attention to the question of compensation for such injuries. While she was confined to the hospitals, she was completely paralyzed from the waist down for six months, [fol. 26] she underwent six operations in New York and two in St. Louis and was treated by the Sakin Solution from the time of the injury to the latter part of May, 1926, and treatment to her spine required the application of special casts, which immobilized her entire body for a period of six weeks.

Plaintiff further proposes to prove from the examination of the elevator immediately after its fall that it had been carelessly and negligently constructed and maintained. That the safety device relied on did not grip and that the bumper springs at the bottom of the elevator pit were inadequate and as a result of the force of the fall were driven through the floor of the car. And further plaintiff proposes to prove by tenants and visitors to the building that the elevator had constantly been out of order and in need of repairs and that this situation was known to the agents and/or employees of said Frank G. Ormsby. Further, that the safety device on said elevator had been in service since 1896 and was antiquated and inefficient and not such a safety device as was permitted by the laws of the State of New York at the time of the accident, and was not the best and most approved appliance in general, practical use for the safety of passengers in this elevator.

By reason of the injuries which the plaintiff suffered, she was obliged to pay out and expend money for medicine and medical attention for various *obligations* performed, [fol. 27] for the employment of persons to attend her, for the purchase and constant refitting of an artificial leg and for braces, supports and appliances and will continue to be subjected to such expenses for the balance of her life. By reason of said injuries the plaintiff's earning capacity has been greatly diminished and from the time of the accident she suffered and continues to suffer great pain and distress, both mental and physical, and she has been permanently disfigured and maimed. That these injuries are

the direct consequence of the negligence of the said Frank G. Ormsby. On October 17, 1925, the plaintiff was sixteen years of age. The plaintiff further offers in evidence the statement of claim and the affidavit of defense for the purpose of showing the admissions of the facts by the defendant. The plaintiff also offers the stipulation that was filed of record by counsel in an effort to agree on a state of facts.

Mr. Eldredge: I object to the offer on the ground that the facts offered to be proved are immaterial and irrelevant, in view of the admitted fact that Frank G. Ormsby died before any suit was instituted in any Court by the present plaintiff.

The Court: The objection is sustained and an exception allowed to the plaintiff.

MOTION FOR COMPULSORY NON-SUIT

Mr. Eldredge: I now move for a compulsory non-suit.

[fol. 28] The Court: The motion for a compulsory non-suit is allowed.

Mr. Fox: I would like to file of record our motion to strike off the compulsory non-suit, as entered on this date.

The Court: The motion is denied and an exception allowed to the plaintiff.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1932

No. 4864

LOUISE CHASE, Appellant,

vs.

LAURA ORMSBY and B. RUSH FIELD, Executors of the Estate of Frank G. Ormsby, Deceased, Appellees

ORDER IN FORMA PAUPERIS—Filed Feb. 24, 1932

Upon application by counsel for appellant, it is ordered that the above-entitled cause be docketed without the pay-

ment of deposit for costs, and that same be permitted to be proceeded with in forma pauperis.

Per Curiam:

Buffington, Circuit Judge.

Philadelphia, February 24, 1932.

[File endorsement omitted.]

[fol. 30] Minute entry of argument and submission, April 15, 1932, omitted in printing.

[fol. 31] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1932

No. 4864

Louise Chase, by Jesse Blythe, Prochein Ami, and Louise Chase, in Her Own Right, Plaintiff-Appellant,

v.

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased, Defendants-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Davis, and Thompson, Circuit Judges

Opinion—Filed April 7, 1933

Davis, Circuit Judge:

This is an appeal from an order of the District Court refusing to take off a compulsory nonsuit.

The plaintiff, Louise Chase, a resident of St. Louis, was, on October 17, 1925, temporarily residing in New York City in an apartment house which belonged to Frank G. Ormsby, who was then living at Easton, Pennsylvania, and was a resident and citizen of that Commonwealth and remained so until his death.

[fol. 32] On the morning of October 17, 1925, the plaintiff and her mother entered the elevator of the apartment

house and the elevator suddenly fell from the fifth floor to the basement. Her mother was killed and the plaintiff was seriously injured. She spent about a year and a half in hospitals. For six months she was in a plaster cast. One limb was so badly injured that it had to be amputated and the other was ruined for life.

This suit was brought in the Eastern District of Pennsylvania, where Ormsby resided, against the executors of his estate, to recover damages for the injuries which the plaintiff received in the fall of the elevator, which she alleges was due to the negligence of their testator.

The injuries were received on October 17, 1925. Ormsby died in Easton on June 14, 1926, and suit was brought against his executors in the Eastern District of Pennsylvania on March 17, 1927, within two years after the accident. An affidavit of defense was filed in which it was averred that the death of Ormsby abated the action under the law of New York and that the suit could not be brought and maintained against his executors in Pennsylvania. A question was thus raised under the Pennsylvania pleading in the nature of a demurrer. In Pennsylvania a suit may be brought under the statute against the executors of a tort feasor's estate. A stipulation was entered into by counsel whereby they submitted to the court the question of the right of plaintiff to maintain her action in Pennsylvania. The court in an opinion indicated that the action could not be maintained but said that the question had not been properly raised and suggested that the case be tried to the court and jury. Subsequently a jury was called for the trial of the case and at the trial the plaintiff offered to prove the above facts, but the court sustained an objection to the offer and entered a compulsory nonsuit which [fol. 33] it refused to take off and thereupon the plaintiff appealed.

Passing by minor contentions in the case, the real question is whether or not the cause of action under the above facts survived in Pennsylvania and could be prosecuted against the executors of Ormsby's estate.

The general rule of law declared in both text books and decisions is that substantive rights are determined by the law of the place where the tort was committed, the lex loci delicti commissi, but remedial rights, the rules regulating the machinery by which substantive rights are established,

are determined by the law of the place where those rights are sought to be enforced, the lex fori. Treatise on Conflict of Laws, by Beale, p. 1105; Goodrich on Conflict of Laws, p. 158; Slater v. Mexican National R. R., 194 U. S. 121, 126; Davis v. Mills, 194 U. S. 451; Spokane, etc. R. R. v. Whitley, 237 U. S. 487.

The allegations of negligence in the complaint are assumed to be true.

When the elevator fell and the plaintiff was negligently injured a cause of action arose. This invested the plaintiff with a property right and gave her the right to sue and at the same time it subjected the tort feasor to the liability of being sued. The State of New York could not confine the cause of action within its own borders nor prescribe the court in which the right should be enforced, nor define the procedure therefor. Tennessee Coal, Iron & Railroad Co. v. George, 233 U. S. 354. The action was transitory and wherever Ormsby went this liability went with him and attached to him personally until the moment of his death.

When Ormsby died, did the cause of action die with him or did it survive and the liability to be sued pass over to his executors?

This question depends upon whether it is to be determined by the laws of the State of New York, where the [fol. 34] tort was committed, or by the laws of the State of Pennsylvania, where Ormsby lived and died and where suit was brought. In New York, the death of Ormsby abated the action, but in Pennsylvania it survived. The Act of March 30, 1921 (P. L. 255 Section 35 (b)) provides that, "Executors • • • shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived". If Ormsby had lived admittedly this suit might have been brought and maintained against him.

All the authorities agree that survivability of a cause of action is a property right and not a question of procedure. State legislatures have absolute dominion over the property or estate of dead men and determine what causes of action survive and what abate with their death. Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted.

The right to revive an action in a federal court is made by the United States Statute to depend upon its survivability. Whether or not it survives will be determined by the federal court in accordance with the laws of the state where the action is brought. This rule of law is supported by the cases discussed below.

In the case of Martin v. Wabash Railway Co., 142 Fed. 650, Judge Grosscup, speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

"Whether a cause of action survives by law, is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought."

In that case Martin lived in Illinois and brought suit in that State against the Wabash Railway Company, a corporation of Ohio, to recover damages for personal injuries received [fol. 35] by him in Indiana. After judgment in the District Court and while the case was pending in the Circuit Court of Appeals, Martin died. The statute of Illinois provides that, "in addition to actions which survive by common law, the following actions also survive; action of replevin, action to recover damages for an injury to persons". Under the law of Indiana, the cause of action died with the plaintiff, just as in the case at bar, it died in New York with Ormsby, but the court held that whether or not the cause of action survived depended upon the law of Illinois where the action was brought, not upon that of Indiana, where it abated and so the action was maintained.

In Page v. United Fruit Co., 3 Fed. (2d) 747, one Michael R. Ryan, a citizen of Connecticut, was injured by the defendant, United Fruit Company in Costa Rica. Suit to recover damages was brought by Ryan in the district of Massachusetts. After verdict and while the case was pending in the Circuit Court of Appeals for the First Circuit, plaintiff died, and Page was substituted for him as plaintiff. It was contended on application for a rehearing that under the law of Costa Rica the cause of action did not survive and that the substituted plaintiff was improperly admitted to prosecute the cause. In reply to this contention, the Circuit Court of Appeals said:

"The right to revive the action is not affected by the fact that the plaintiff received his injuries in Costa Rica. The action having been brought in the Massachusetts district, the right to revive it is governed by the law of Massachusetts not by that of Costa Rica."

In the case of Martin's Administrator v. Baltimore & Ohio Railroad, 151 U. S. 673, the plaintiff brought suit against the Baltimore & Ohio Railroad Company in the State of West Virginia for injuries received by him in the State of Maryland. The suit was tried and a verdict was [fol. 36] rendered against Martin and for the defendant. The plaintiff appealed. Before the appeal was heard Martin died. In Maryland, a tort action does not abate with the death of the plaintiff. It survives for the benefit of his next of kin or personal representatives. But in the State of West Virginia, where the suit was brought, an action for personal injuries abates with the death of the person injured. The question at issue was whether or not Martin's administrator could maintain the action. This depended upon whether the survival of the cause of action was to be determined by the laws of Maryland or West Virginia. The court held that when the cause of action does not arise under a law of the United States, its survival depends upon the law of the state where the suit is brought and not upon the law of the state where the injury was received and so dismissed the writ of error. After citing and analyzing many cases it said:

"The result is, that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed nunc pro tunc in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a venire de novo be awarded, no new trial could be had, because the action has abated by his death."

The court dismissed many cases on arrival at actions. The substance of the dismissals is fairly summed up in the syllabus as follows:

[Fol. 37] "The question, whether a cause of action survives to the personal representative of a deceased person, is a question not of procedure, but of right; and, when the cause of action does not arise under a law of the United States, depends upon the law of the State in which the suit is brought."

In Baltimore & Ohio Railroad Co. v. Jay, 173 U. S. 690, one John A. Harvey, a citizen of the State of Ohio, was injured at Alton, Indiana, in a collision caused by the negligence of the railroad company. He brought suit in the Common Pleas Court of Hancock County, Ohio, to recover damages for the personal injuries which he had thus received. The railroad company removed the case into the federal court. Thereafter Harvey died and the action was revived in the name of his Administrator, Jay, over the objection of the railroad company.

At the time of Harvey's death section 5111 of the Revised Statutes of Ohio provided that: "No action or proceeding pending in any court shall abate by the death of either or both of the parties thereto." On the other hand, the statute of Indiana provided that, "a cause of action arising out of an injury to the person, dies with the person of either party", with exceptions here immaterial. It was contended by the railroad company that the cause of action abated with the death of Harvey in accordance with the provision of the statute of Indiana which created the cause of action and defined the rights of the plaintiff.

The case eventually reached the Circuit Court of Appeals for the Sixth Circuit which certified the following question to the Supreme Court for its instruction:

"Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained [fol. 38] by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?"

The Court answered the question in the negative and held that the right to recover was of substantial value, attached under the local law of Ohio when suit was brought, was pending at the death of Harvey, became inseparably connected with the cause of action on the laws of Ohio were concerned and was not lost either upon the removal of the case into the federal court or the death of Harvey. It said:

"Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced * * *; that the determination of the question of the right to revive this action in the name of Harvey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revival of actions brought in the courts of Ohio for personal injuries is governed by the laws of that state, rather than by the law of the State in which the injuries occurred."

In this last case, the action survived because the legislature of Ohio had provided that it survived if it was "pending" at the time of the death of either party although it had abated in Indiana where the tort was committed. In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the tort feasor [fol. 39] and may be maintained against his executors, if it could have been maintained against him if he had lived. The test of a survival of an action depends upon whether or not it comes within the terms of the statute in the state where suit is brought. In the Jay case, supra, it was "pending" when Harvey died and was thus brought within the provisions of the statute, but in the case of Martin's Administrator v. Baltimore & Ohio Railroad, supra, it did not meet the requirements of the statute, for there was no statute providing for the survival of actions in West Virginia where the suit was brought and so the action abated with the death of Martin although it survived in Maryland

where the injuries were received. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his executors for it complies with the requirements prescribed by the legislature.

It follows that the judgment must be reversed and a venire facias de novo awarded.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 40] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 4864

Louise Chase, by Jesse Blythe, etc., and Louise Chase, in Her Own Right, Appellants,

vs.

Laura Ormsby et al., Exrs. Est. Frank G. Ormsby, Dec'd, Appellees

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment—Filed April 7, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and a venire facias de novo awarded.

Philadelphia, April 7, 1933.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.